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10 Attorney for Defendant
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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 UNITED STATES OF AMERICA,)	CR-12-0119-SI
15)	
16 Plaintiff,)	MEMORANDUM OF POINTS AND
17)	AUTHORITIES REGARDING
18 v.)	GOVERNMENT'S REBUTTAL
19)	<u>ARGUMENT</u>
20 MARIO BERGREN, et al.,)	
21)	
22 Defendants.)	

23 INTRODUCTION

24 Defendants submits the following memorandum of law regarding the government's
25 rebuttal argument. The government has requested a full court day for rebuttal. In anticipation
26 of potential issues regarding the need for such a lengthy rebuttal argument, the defense
27 submits the following.

28 ARGUMENT

THE GOVERNMENT'S REBUTTAL ARGUMENT MUST BE LIMITED TO
ARGUMENTS PREVIOUSLY MENTIONED IN ITS CLOSING-IN-CHIEF
AND CAN ONLY BE A RESPONSE TO DEFENSE COUNSEL'S
ASSERTIONS DURING THE VARIOUS DEFENDANTS' CLOSINGS.

As made clear by the advisory committee notes to Rule 29.1, "fair and effective
administration of justice is best served if the defendant knows the arguments actually made by
the prosecution in behalf of conviction before the defendant is faced with the decision whether

1 to reply and what to reply.” (Fed.R.Crim.P. 29.1, Advisory Committee’s Note.) Thus, the
 2 government should not be allowed to raise arguments in rebuttal not previously mentioned in
 3 its closing-in-chief.

4 Rebuttal is proper as a response to defense counsel’s assertions regarding witness
 5 credibility, to advance arguments to which the defendant has opening the door, and to argue
 6 reasonable inferences from the evidence. (See *United States v. Polizzi*, 801 F.2d 1543, 1558
 7 (9th Cir.1986)(prosecutors are free to argue reasonable inferences from the evidence); *United*
 8 *States v. Chavez-Vernaza*, 844 F.2d 1368, 1376 (9th Cir.1987); *United States v. Lopez*, 803
 9 F.2d 969, 972; *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir.1989); *United States v.*
 10 *Maloney*, 755 F.3d 1044, 1048 (9th Cir.2014) (*en banc*)(government admitted it had
 11 improperly “sandbagged” the defense by waiting for the first time to bring up an argument in
 12 its rebuttal argument).)¹

13 During closed arguments, prosecutors have considerable leeway to strike “hard
 14 blows” based on the evidence and all reasonable inferences from the evidence. (*United States*
 15 *v. Hermanek*, 289 F.3d 1076, 1100 (9th Cir.2002) However, in the specific context of rebuttal
 16 summation, “a prosecutor cannot use rebuttal to put forth new arguments, but is restricted to
 17 responding to the points made by the defense counsel in closing arguments. (*United States v.*
 18 *Taylor*, 728 F.2d 930, 937 (7th Cir.1984).)

19 Rebuttal argument should not just be another opportunity to argue exactly what the
 20 government had argued in its closing-in-chief. Nor would it be proper for the government to
 21 urge jurors to convict a criminal defendant in order to protect community values, preserve
 22 civil order, or deter future lawbreaking. (*United States v. Sanchez*, 659 F.3d 1252, 1256
 23 (9th Cir.2011).) Also, it would violate due process if the government during rebuttal
 24
 25

26 ¹ In commending the United States Attorney for confessing error, the Ninth Circuit
 27 reiterated the maxim that “a prosecutor is the representative not of an ordinary party to a
 28 controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its
 obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it
 shall win a case, but that just shall be done.” (*United States v. Maloney, supra*, 755 F.3d at p.
 1046, quoting *Berger v. United States*, 295 U.S. 78, 88 (1935).)

1 impermissibly commented on a defendant's exercise of his Fifth Amendment rights. (See
2 *United States v. Baker*, 999 F.2d 412, 415 (9th Cir.1999).)

3 CONCLUSION

4 For the foregoing reasons, BERGREN respectfully submits that the government's
5 rebuttal argument be properly restricted in scope.

6 Dated: September 21, 2014

7 Respectfully submitted,

8 /s/
9 GEORGE C. BOISSEAU
DENA YOUNG

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